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No. 86

JOSEPH F. SPANIOL, JR.  
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IN THE  
**Supreme Court of the United States**

October Term, 1986

STATE OF MINNESOTA,

*Petitioner,*

vs.

ORVILLE BERNDT, JR.,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI  
TO THE MINNESOTA SUPREME COURT

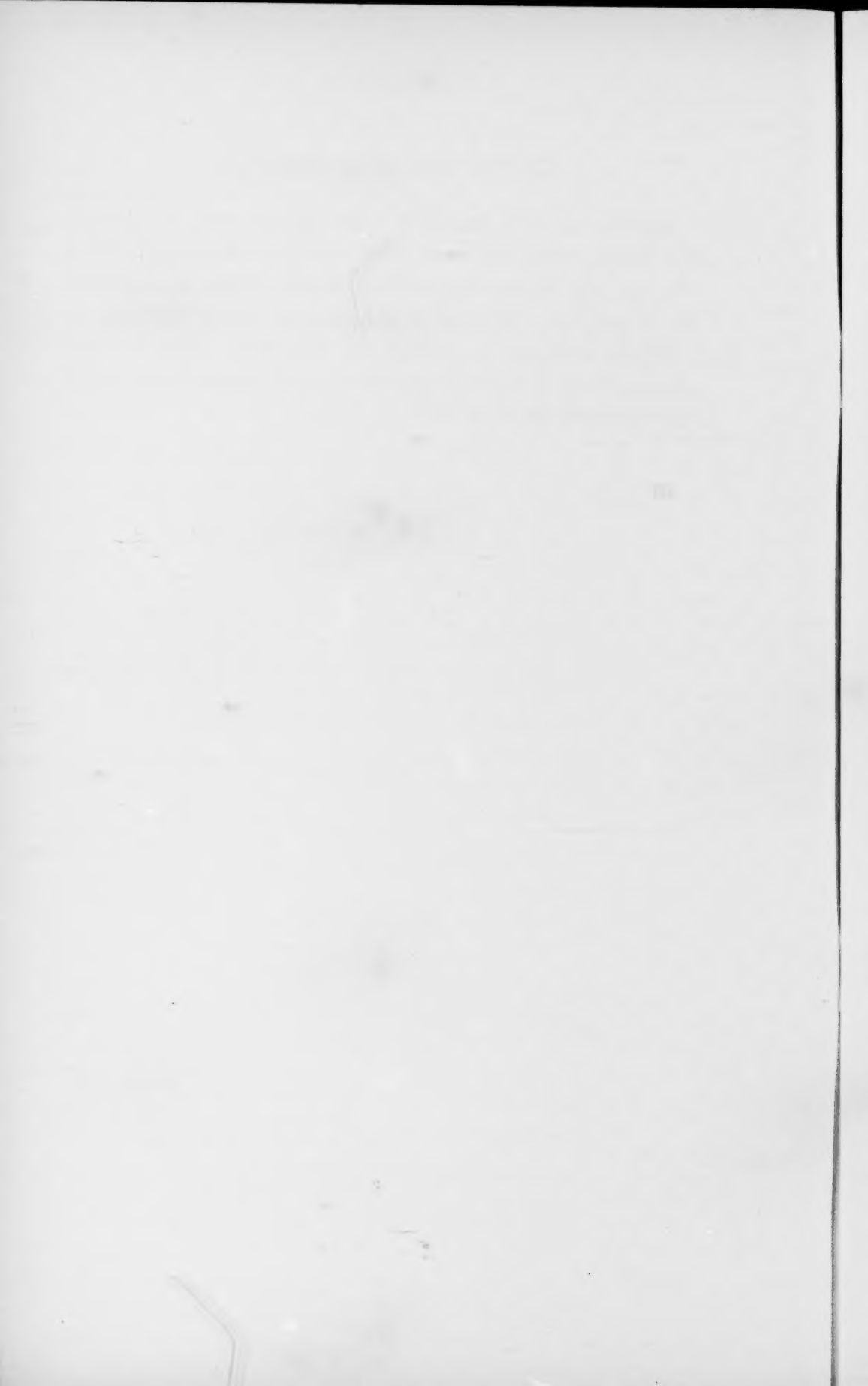
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## QUESTION PRESENTED

Whether a state appellate court may reverse a criminal conviction on the ground of evidentiary insufficiency, thereby invoking the United States Constitution's Fifth Amendment double jeopardy clause bar against retrial, where the evidence is legally sufficient to sustain the conviction under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution?



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**PETITION FOR A WRIT OF CERTIORARI  
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The Hennepin County Attorney, on behalf of the State of Minnesota, respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court entered in this proceeding on August 29, 1986.

**OPINIONS BELOW**

The original opinion of the Minnesota Supreme Court, reproduced and attached hereto as Appendix B, is unreported. The order and substituted opinion of the Minnesota Supreme Court, reproduced and attached hereto as Appendix A, is reported at 392 N.W.2d 876 (Minn. 1986). The order and memorandum of the trial court, reproduced and attached hereto as Appendix C, is unreported.

## STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court was entered on August 29, 1986. This petition for a writ of certiorari was filed within sixty days of that judgment. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) (1982).

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution:

. . . [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law; . . .

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

. . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

Minnesota Statute §609.185(1)(3) (1981):

### MURDER IN THE FIRST DEGREE.

Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:

(1) Causes the death of a human being with premeditation and with intent to effect the death of the person or of another;

\* \* \*

(3) Causes the death of a human being with intent to effect the death of the person or another, while committing or attempting to commit . . . arson in the first or second degree . . .

\* \* \*

## STATEMENT OF THE CASE

On November 12, 1983, a Hennepin County District Court jury convicted respondent Orville Berndt, Jr., of eight counts of Murder in the First Degree for the arson deaths of his wife, his son and his two stepsons. In a post trial appeal, the Minnesota Supreme Court reversed all eight murder convictions on the ground that the evidence was insufficient to sustain the convictions (App. B2). The State of Minnesota filed a petition for rehearing on the grounds that essential evidentiary exhibits were never delivered to or examined by the Minnesota Supreme Court and that the opinion contained numerous factual errors and overlooked important arson expert testimony (App. I). Five months later the Minnesota Supreme Court withdrew its original opinion and substituted for it an opinion that was identical to the original with the exception of one factual correction (App. A).<sup>1</sup> It also denied the State of Minnesota's motions requesting that the court examine the undelivered evidentiary exhibits (App. A). The circumstances leading to respondent's eight murder convictions are as follows.

Shortly before 3:00 a.m. on August 21, 1981, a townhouse unit in the city of Brooklyn Center, Minnesota, became en-

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<sup>1</sup> Respondent was discharged from prison the date the original judgment was filed. The Minnesota Supreme Court held in a previous decision that when it has found that the evidence is insufficient to sustain a conviction, the double jeopardy clause as it was interpreted in *Burks v. United States*, 437 U.S. 1 (1978) bars a new trial. See *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979). The entry of a substituted judgment by the Minnesota Supreme Court following the petition for rehearing is therefore a final judgment within the meaning of 28 U.S.C. §1257(3) (1982).

gulfed in flames.<sup>2</sup> Neighbors and police officers arriving on the scene saw respondent standing in front of the burning building. No one observed respondent either in or coming out of the burning building.<sup>3</sup> While respondent stood outside, two neighbors made unsuccessful attempts to enter the townhouse unit to rescue respondent's family. Firemen brought the fire under control by 3:34 a.m. Respondent yelled obscenities at the firemen as they fought the fire. In an effort to locate and rescue the victims, a police officer approached respondent and asked where in the townhouse respondent's family members were located. Respondent refused to cooperate and threatened to strike the police officer. Once the fire was under control, firemen entered the townhouse and looked for victims. The charred body of respondent's wife, Brenda Berndt, was found on the floor of the dining room with her legs and feet going through the doorway into the kitchen. On the second floor the body of respondent's 14 year old stepson Richard Gage was found face down on the floor in the front bedroom. The bodies of respondent's 10 year old stepson Michael Gage and of respondent's 4 year old son Corey Berndt were found on the floor in the second bedroom on the second floor. Corey's body was

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<sup>2</sup> The transcripts of the pretrial, trial and post trial proceedings in this case total approximately 3,000 pages. Over half of the trial testimony and post trial testimony (approximately 1400 pages) consisted of testimony by witnesses experienced in the area of fires, arson investigation and gas chromatography. The extremely important parts of the record will be referenced to in this petition and will either be quoted in the petition or reproduced in the appendix.

<sup>3</sup> Respondent's next door neighbor stated that it "seemed" to him that respondent came out of his townhouse at the same time the neighbor ran out of his own townhouse. But the neighbor admitted that he never actually saw respondent come out the door of the burning building.

on its back with Michael's body partially on top of it. Except for slight singeing of his eyelashes and arm hair on the left side of his body, respondent was uninjured by the fire.

The fire had spread rapidly and engulfed the townhouse in a very short period of time. Police Officer Robert Adams was conducting a traffic stop across the street from the townhouse complex at approximately 2:45 a.m. When he left the area at 2:48 a.m., the area was very quiet and there was no sign of fire or smoke. Officer Adams had driven only a few blocks from the townhouse complex when he received a dispatcher call about a fire. He immediately returned to the townhouse complex and arrived there at 2:54 a.m., just six minutes after he had left the area. As he arrived, he saw that the townhouse was engulfed in fire with flames coming out of every window on both the upstairs and downstairs with the exception of the front window on the second floor. Another officer observed that only the first floor was in flames when she arrived but the second floor burst into flames within thirty seconds to a minute after her arrival. The townhouse was totally engulfed in flames when the first fire truck arrived at the scene at 2:56 a.m. The neighbors concurred that the townhouse became totally engulfed in flames within a very short period of time. It was the worst residential fire ever observed by the firemen at the scene.

A fire inspection team began investigating the fire scene a few hours after the fire had been extinguished. The inspection of the fire scene took a total of three days over a four-day period. The fire scene was under 24 hour police protection from the time of the fire until the completion of the inspection. The team included Brooklyn Center Fire Marshal Jerry Pedlar, a trained arson investigator who had investigated over 200 fires. It also included Ward Mahlen, a trained arson spe-

cialist from the Hennepin County Sheriff's Office. Other team members included the state fire marshal.

The first and second level of the two-story townhouse had been almost completely destroyed by the fire. Multiple classic signs of an arson fire ignited by a flammable liquid were found in the townhouse.<sup>4</sup> There were numerous low burn patterns that could only be explained by the presence of a liquid accelerant.<sup>5</sup> Trailer patterns, which are burn patterns consistent with the use of an accelerant to guide a fire along, were also present in the townhouse. The trailer patterns were sixty feet in length with widths varying from three inches to two feet. The trailers were found in the kitchen, led into the dining room with a heavy burn area concentrated around Brenda Berndt's body and extended into the living room. A trailer pattern led from the living room, covered the hallway by the stairs and led to the front entryway. Trailers were also found on the stairway. Heavy concentrations of low burn with heavy charring were found at the entrance of each of the upstairs bedrooms where the young boys had been trapped. All of these burn patterns were consistent with the pouring of a flammable liquid and could *not* be explained by any other cause.

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<sup>4</sup> The physical evidence showing that the fire was arson was set forth in exhaustive detail during the testimony of Mr. Pedlar and Mr. Mahlen at trial (Trial transcript 347-505, 710-864). Photographs and videotapes of this physical evidence were admitted as evidentiary exhibits at trial.

<sup>5</sup> The locations of the suspicious burn patterns, the victims' bodies and the areas from where positive samples of gasoline were taken were depicted at trial on two diagrams that were admitted into evidence as State's Exhibits Nos. 18 and 19 (App. F and App. G). These exhibits were used throughout the trial to explain the testimony of the arson experts. The markings on these two exhibits were explained during the testimony of Ward Mahlen (App. J12-18). These exhibits were never examined by the Minnesota Supreme Court.

Numerous samples taken from the fire scene were tested by the use of gas chromatography for the presence of an accelerant.<sup>6</sup> Five samples were found to contain gasoline. These five samples came from the front door entryway, the kitchen windowsill, the living room area by the sofa, the stairway and the suspicious low burn patterns at the entrance of the bedroom where two of the boys were trapped.

Examination of the fuse box, circuits, electrical outlets, switches and appliances ruled out all electrical causes for the fire. No accidental cause for the fire could be found.

The inspection team did not find any empty non-combustible gasoline containers at the fire scene.<sup>7</sup> A half empty gasoline container was found in the caretaker's garage unit. Respondent shared this unit with the caretaker and had a key to it. Another half empty gasoline container was found in another garage at the townhouse complex. The caretaker assumed that the men working the grounds had used the missing gasoline but he did not know for certain that the gasoline had been used by the groundskeepers. Both half empty gasoline containers were next to garbage dumpsters. The inspection team found both dumpsters to be empty. Garbage collectors had emptied the dumpsters between the time of the fire and the time the inspection began a few hours later. Numerous cars were parked near the townhouse, including the respondent's car. Respondent knew how to siphon gas from a car.

Respondent made statements to the police on three separate occasions as to how the fire started. The first statement was

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<sup>6</sup> A liquid accelerant is normally totally consumed by the fire. Samples were taken from areas where some of the accelerant may have been protected from the flames, such as under a plate or under a tile.

<sup>7</sup> The fire scene was littered with debris of melted, unidentifiable combustible materials.

made in an interview at police headquarters at approximately 7:00 a.m. on the morning of the fire. Respondent was given his Miranda rights and was told that, due to the rapid fire spread, the police suspected that the fire may have been caused by arson. He was also informed that he was a possible suspect. Respondent told the police that there were no problems with his marriage and that his wife had a life insurance policy through her employer. He stated that he and his wife had been to several bars the evening of the fire and that he had been driving. They arrived home at approximately 1:00 a.m., whereupon his wife went upstairs to bed. He made himself dinner and ate it on the sofa. He admitted he had disconnected the smoke alarm earlier that evening so that it would not go off when the boys made pizza. He claimed he fell asleep on the couch in the living room. When he woke up, he saw a fire in the dining room area up near the ceiling between the kitchen and dining room. Upon seeing the fire, he jumped off the couch, ran through the living room past the stairway, through the hallway and out the front door. He did not mention anything about seeing his wife at the time of the fire nor did he indicate he made any effort to rescue his family. Respondent did not complain of any injuries. The police did not confiscate his clothing. Later that day respondent learned that his wife's body had been found in the dining room on the first floor.

On August 27, 1981, six days after the fire, respondent was again interviewed by the police. At this time he related the same story about the fire and again did not mention seeing his wife during the fire. A third interview took place on October 6, 1981, approximately six weeks after the fire. The police told respondent that tests revealed that gasoline residue had been found in the fire scene samples and that he was their

only suspect at that time. Respondent then, *for the first time*, told the police that he now thought it was possible that his wife had fallen asleep on the couch with him. He claimed she woke up to the fire, said "Oh my God" and ran into the dining room towards the fire. When the police told him that they thought it would have been impossible for him to escape in the way he claimed he did without suffering injury, respondent claimed that the bottoms of his feet had turned brown and peeled off about a week after the fire. He never had his feet examined by a doctor. Respondent also suggested to the police that his caretaker may be a possible suspect.

The inspection team findings were reviewed and confirmed by independent arson experts and the police conducted an investigation into both respondent's relationship with his wife and respondent's financial status. Following this investigation, the Hennepin County Grand Jury returned an indictment on August 17, 1982, charging respondent with four counts of Murder in the First Degree in violation of Minn. Stat. §609.185 (1) (1981) (intentional and premeditated murder) and with four counts of Murder in the First Degree in violation of Minn. Stat. §609.185(3) (1981) (intentional murder by arson) for the deaths of his wife, his son and his two stepsons. Respondent remained free on bail until the time of his conviction.

Respondent's jury trial commenced on October 20, 1983, and lasted approximately four weeks. The prosecution presented testimony by witnesses present at the fire scene as well as by several arson experts.

Ward Mahlen, the arson specialist from the Hennepin County Sheriff's Office, testified as to the physical findings at the fire scene. During his testimony, diagrams depicting the location of the bodies, the most severe suspicious burn patterns and the location from where the positive gasoline findings

were found were admitted into evidence as State's Exhibits Nos. 18 and 19 (App. F, App. G). He testified that there was no indication of any electrical cause for the fire and stated that he saw "no way that the fire could have been started and burned in any natural or accidental manner" (App. J19-20). He noted that several distinct burn patterns were present in the townhouse that could only result from the use of a liquid accelerant. These patterns included: the deep scarring and rutting pattern in the dining and living room (App. J1-4); the irregular bubbling burn pattern on the kitchen tile (App. J9-10) and kitchen windowsill (App. J7-8); the burn pattern on the kitchen table indicating that the fire burned from the top down (App. J5-6); and the burn pattern through the tread of the stairs to the underside (App. J10-12).

Brooklyn Center Fire Marshal Jerry Pedlar also testified as to his findings and expert conclusions. Mr. Pedlar testified that based upon the numerous burn patterns that could only be accounted for by the presence of a liquid accelerant, the rapid acceleration of the fire and the finding of gasoline in five separate parts of the townhouse, it was his professional opinion that the "fire was started as a result of flammable liquids" (App. K6-7). He further stated that this would still be his opinion even if the fire samples had not tested positive for gasoline (App. K8-9). He testified that once the fire was ignited, it would have been impossible for respondent to have run from the living room to the front door without being seriously injured by the fire (App. K7). Mr. Pedlar explained that gasoline is "highly volatile" and that "once ignition has been made of the area . . . you get an automatic ignition of the fumes throughout the area" (App. K1-2, K8). He also ruled out the possibility that the fire was caused by an electrical problem (App. K2-5).

Two additional arson experts testified for the prosecution at trial. Both experts had reviewed the reports, photographs and videotapes of the fire scene. The first expert was James Carlson, a trained arson investigator who was self employed as an arson consultant. Mr. Carlson had been a member of the Minneapolis Fire Department for thirty years. For twelve of those years he worked as a fire investigator and he was Chief Investigator for an additional five years. Mr. Carlson testified that based upon his review of the fire scene materials, it was his professional opinion that the fire was "an arson fire" that "was ignited by hand by the use of flammable liquid, gasoline" (App. L3). He noted that the deep scarring and rutting in the dining and living rooms could only be explained by the presence of a flammable liquid (App. L6-7). He also concurred with Mr. Pedlar's opinion that it would have been impossible for respondent to run from the living room to the front door without being "severely harmed" (App. L3). He explained that ignition of a fire in an area with gasoline results in "immediate ignition of the entire room" and that this is a "rapid ignition that happens within a fraction of a second, resulting in a fire" (App. L1-2).

Mr. Carlson determined that the investigation conducted "relative to electrical cause" was "totally sufficient" (App. L8). He testified that electrical fires are slow burning and are not consistent with the speed with which this fire spread through the house (App. L4-5). He also testified that fires started by a careless cigarette are also slow moving and are inconsistent with the rapid fire spread (App. L7-8). He noted that if the fire had been caused by a cigarette in the carpet, it would have required the cigarette to smolder for one and a half hours before ignition. If that had happened,

persons on the first floor would have died from asphyxiation before ignition due to the high level of carbon monoxide (App. L6-7).

The other arson expert was Sharadchandra Bhatt, an engineer with a Master of Science Degree. He was experienced in both testing and investigating the use of accelerants in fires (App. M1). He estimated that the presence of five gallons of gasoline on the first floor would have been sufficient to cause the fire (App. M1-2). Mr. Bhatt concurred with Mr. Pedlar's opinion that ignition of an area containing gasoline would result in the instantaneous combustion of all gasoline fumes (App. M3). He testified that under these conditions, it would not be possible for there to be an isolated fire on the first floor for any significant period of time (App. M3-4). Mr. Bhatt testified that the burn patterns found in the living room could only have been caused by gasoline or some other flammable liquid (App. M5-6). In his professional opinion, the rapid spread of the fire was inconsistent with an electrical fire and consistent with a gasoline fire (App. M4-5).

The fire scene samples had been tested by Richard E. Tontarski, a forensic scientist employed by the United States Bureau of Alcohol, Tobacco and Firearms (ATF) at the National Laboratory Center in Rockville, Maryland. Mr. Tontarski had a Bachelor's Degree in Foreign Affairs, had completed the necessary college course work to be a chemist and had received a Master's Degree in Forensic Science from George Washington University in 1978. He had worked as a scientist for the ATF since 1978 and at the time of trial had analyzed fire scene samples for approximately 300 to 400 arson cases. He explained his testing technique and testified that he made a *positive* identification of gasoline in the chromatograms from five of the fire scene samples (App. N1-4).

There was testimony that neither the fire scene nor respondent smelled like gasoline on the night of the fire. Both the fire scene and respondent did smell of smoke. Experienced fire fighters and arson experts testified that once a gasoline fire is ignited, the gasoline smell is often masked by other fire smells such as smoke and that it is not unusual to *not* smell gasoline either at the fire scene or on the person who poured the gasoline (App. K5-6, K9-10, K10-11, App. L5, App. O1-4). Even the defense's arson expert conceded that other smells such as smoke may "override" gasoline odors (App. O5).

Medical testimony showed that the three boys died of carbon monoxide poisoning. Because a low level of carbon monoxide was found in Brenda Berndt's lungs, her death was attributed to a "superheated death." "Superheated death" occurs when there is an instantaneous combustion, or a very hot fire. The victim breathes in extremely hot air which damages the lungs and causes death before a lethal level of carbon monoxide can be absorbed by the lungs. Brenda Berndt's blood alcohol content at the time of death was .25 grams, indicating a high level of intoxication. Her scalp was extremely damaged by the fire. The medical examiner was able to determine that she had not suffered any major head injury before her death but could not rule out the possibility of a lesser blow to her head or face. Medical testimony also established that on the basis of a blood sample taken from respondent several hours after the fire, his blood alcohol content at the time of the fire could at the most have been .12 or .13 grams.

Testimony at trial showed that Brenda Berndt had a \$15,000 life insurance policy that had a double indemnity benefit worth \$30,000 if she died accidentally. Although the policy did not specify a beneficiary, respondent as her spouse had first priority as her beneficiary. After his wife's death, respondent filed a claim for this \$30,000 benefit. Evidence also

showed that Respondent had bought a new used car just before the fire. The loan for the car was insured for \$3,900 and the policy carried a life insurance provision which provided that the loan would be retired upon the death of either Brenda Berndt or respondent. After Brenda Berndt's death, the loan was automatically retired. At the time of the fire, the gas to respondent's townhouse had been turned off because respondent had not paid his utility bill. Respondent was also one month behind in paying the rent on his townhouse unit.

Witnesses testified that there had been major problems with promiscuity throughout respondent's seven-year relationship with his wife. Respondent had made repeated sexual advances towards his wife's sister and engaged in at least three extra-marital sexual affairs during his marriage. He once physically accosted a thirteen year old babysitter. Although respondent claimed at trial that he and his wife had worked everything out a year prior to the fire, *significant* evidence rebutted this claim. Testimony showed that Brenda Berndt had a sexual affair with a mutual acquaintance several months before her death. Two months before his wife's death, respondent grabbed the breasts of another woman in the presence of his wife. Also, shortly before his wife's death, respondent asked a friend to participate in "wife swapping."

Respondent admitted during his testimony that it was unlikely that somebody else broke into the house and poured gasoline throughout the first floor while he was sleeping on the couch. Instead, his defense was premised upon the contention that the fire could have been the result of accidental causes. He presented two expert witnesses in support of this theory.<sup>8</sup> The defense's expert on gas chromatography testified

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<sup>8</sup> Significant flaws undermining the credibility of both experts' opinions were revealed at trial. These flaws are set forth in detail in the prosecution's petition for rehearing (App. I32-34, I36-38).

that he disagreed with Mr. Tontarski's opinion that the chromatograms from the five fire scene samples showed the presence of gasoline. The defense's arson expert testified that he believed there were three possible accidental causes for the fire but on cross examination he abruptly *abandoned* two of these three theories. His only remaining theory was that a smoldering cigarette could have caused the accumulation of gases and ignited a "flashback" fire.

Bruce Ryden, Fire Marshal for the Roseville Fire Department, testified as a rebuttal witness for the prosecution. He testified that the carbon monoxide buildup necessary for a flashback fire would have caused the deaths of the occupants on the first floor (respondent and respondent's wife) before the gases reached their ignition point (App. P1-3).<sup>9</sup>

The trial court properly instructed the jury on reasonable doubt, circumstantial evidence and the evaluation of expert testimony. Twenty-nine hours later, the jury returned with verdicts finding respondent guilty as charged on all eight counts of Murder in the First Degree. The trial court sentenced respondent to concurrent mandatory sentences of life imprisonment on four of the convicted counts and the remaining four murder convictions were merged. Respondent filed a motion for new trial and for a judgment of acquittal. On August 1, 1984, the trial court denied both motions.

Respondent appealed his convictions to the Minnesota Supreme Court and filed his brief on May 1, 1985. Respondent

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<sup>9</sup> The fact that respondent, who claimed he was inside the townhouse, survived the fire and the fact that Brenda Berndt died from exposure to a hot fast fire rather than from carbon monoxide poisoning contradicts the defense's theory of a flashback fire.

asked the supreme court to depart from its usual standard of viewing the evidence in the light most favorable to the jury's verdict. He urged the Minnesota Supreme Court to disregard most of the testimony that was favorable to the verdict.

On March 21, 1986, the Minnesota Supreme Court filed a decision reversing respondent's conviction on the ground of insufficient evidence. The Minnesota Supreme Court declined to view the evidence in the light most favorable to the jury's verdict and concluded that the evidence did not satisfy the circumstantial evidence standard on appeal. It stated that:

The state produced evidence which, if credited by the jury, would sustain its contention that the townhouse fire had been ignited with the use of a gasoline accelerant. . . . Some circumstances proved were consistent with the state's claim of an intentional fire, but other circumstances proved were generally consistent with the rational hypothesis that the defendant was not guilty.

*State v. Berndt*, 392 N.W.2d 876, 881 (Minn. 1986) (App. B10-11). The opinion did not explain what rational hypothesis was consistent with respondent's innocence.

The State of Minnesota filed a petition for rehearing asking the Minnesota Supreme Court to reconsider its decision. In this petition the prosecution noted that the opinion contained numerous factual errors and consistently ignored and omitted essential testimony by the prosecution's arson experts.<sup>10</sup> In preparing its petition, the prosecution learned that certain essential evidentiary exhibits were never sent to or examined

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<sup>10</sup> The important factual errors and omissions are set forth in detail in the petition for rehearing (App. I5-20).

by the Minnesota Supreme Court (App. D).<sup>11</sup> With its petition, the prosecution filed a motion requesting that these essential evidentiary exhibits be delivered to the Minnesota Supreme Court. The prosecution also had State's Exhibits Nos. 18 and 19 (two of the undelivered exhibits) reproduced and sent fourteen copies of these reproductions with a motion requesting that the Minnesota Supreme Court accept and examine these exhibits (App. E).

The petition noted that the Minnesota Supreme Court departed from its usual standard of viewing the evidence in the light most favorable to the jury verdict and that it had instead re-weighed the evidence. The prosecution requested that the supreme court reinstate the convictions and, in the alternative, remand the case for a new trial pursuant to this Court's decision in *Tibbs v. Florida*, 451 U.S. 31 (1982). The prosecution further informed the Minnesota Supreme Court that a new trial would not result in a retrying of the same evidence since new evidence supporting respondent's guilt had come to light since his original conviction. This new evidence included: (1) respondent's confession of the murders to a

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<sup>11</sup> The clerk of the district court is required by Minn.R.Civ.App.P. 111.01 to send to the appellate courts all evidentiary exhibits that are in the possession of the district court. Although respondent in his response to the petition for rehearing claimed that it was the prosecution's duty to transmit the exhibits, this is not correct. Parties are only responsible for making arrangements to transmit exhibits when those exhibits are in the possession of the party. See Minn.R.Civ.App.P. 111.01. Also, the prosecution had been told by the district court clerk's office in June, 1985, that the office was preparing the exhibits for transmission to the appellate court (App. D4-5).

fellow inmate in April, 1985;<sup>12</sup> and (2) the initiation of disciplinary actions by the International Association of Arson Investigators against the defense arson expert Shelby Gallien as a result of his testimony at respondent's trial (App. H1-7).<sup>13</sup>

Respondent filed a response in opposition to the prosecution's petition for rehearing. This response conceded that the opinion contained numerous factual errors. It also implicitly conceded that the supreme court, in finding that the evidence was insufficient, rejected the prosecution's expert testimony establishing that the fire was caused by the use of a gasoline accelerant.

On August 29, 1986, the Minnesota Supreme Court entered an order withdrawing its original opinion and replacing it with a new opinion. This new opinion was identical to the original opinion except that it corrected one of the numerous factual errors contained in the original decision (App. A). This order also denied both the prosecution's motion for an order directing the delivery of the trial evidentiary exhibits to the appellate court and its motion to accept the reproductions of State's Exhibits Nos. 18 and 19 (App. A).

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<sup>12</sup> The name of this inmate and the circumstances concerning respondent's confession are set forth in affidavits and a statement which was submitted to the Minnesota Supreme Court in a confidential appendix. This inmate is still incarcerated and fears that other inmates may take retaliatory actions against him if his identity becomes public. To minimize the risk to the inmate's safety, the prosecution has not referred to this inmate by name in non-confidential court documents.

<sup>13</sup> Documents pertaining to these disciplinary proceedings were submitted to the Minnesota Supreme Court. These documents are reprinted in Appendix H.

## REASONS FOR GRANTING THE WRIT

THE MINNESOTA SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF BOTH THIS COURT AND FEDERAL CIRCUIT COURTS OF APPEALS AND HAS THEREBY EXTENDED THE MEANING OF "EVIDENTIARY INSUFFICIENCY" AND "DOUBLE JEOPARDY" BEYOND THE SCOPE OF THE FIFTH AND FOURTEENTH AMENDMENTS.

The question presented herein is whether a state appellate court may reverse a criminal conviction on the ground of evidentiary insufficiency, thereby invoking the federal constitution's double jeopardy clause bar against retrial, where the evidence is legally sufficient to sustain the conviction under the due process clause of the Fifth and Fourteenth Amendments.<sup>14</sup> Prior decisions by this Court have made the propriety

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<sup>14</sup> The judgment does not refer to the double jeopardy bar against retrial, but the Minnesota Supreme Court held in an earlier decision that *Burks v. United States*, 437 U.S. 1 (1978) bars retrial once it has ruled that the evidence was insufficient to sustain a criminal conviction. See *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979). In decisions prior to *Burks*, the Minnesota Supreme Court has authorized retrials in insufficient evidence cases. See e.g., *State v. Kaster*, 211 Minn. 199, 121-22, 300 N.W. 897, 899 (1941). The Minnesota Supreme Court has never held that the state constitution's double jeopardy clause, Minn. Const. art. 1, §7, affords a defendant greater protection against the possibility of retrial than that afforded by the federal constitution's double jeopardy clause. That it is the federal double jeopardy clause and not an independent state ground that bars retrial here if the judgment is not reversed is underscored by the Minnesota Supreme Court's decision in *State v. Fuller*, 374 N.W.2d 722 (Minn. 1985). In *Fuller*, the Minnesota Supreme Court explicitly declined to give a more expansive interpretation to the state constitution's double jeopardy clause than that given by this Court to the federal constitution's double jeopardy clause. *Id.* at 727.

of a state court's ruling on evidentiary sufficiency a matter of federal constitutional importance. In *Jackson v. Virginia*, 443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979), this Court held that a challenge to a state court conviction on the ground that the evidence was not sufficient to establish guilt beyond a reasonable doubt "states a federal constitutional claim." *Id.* at 322. In *Burks v. United States*, 437 U.S. 1 (1978) and *Greene v. Massey*, 437 U.S. 19 (1978), this Court held that the double jeopardy clause bars retrial when a defendant obtains an unreversed appellate ruling of evidentiary insufficiency from either a federal or state court. This double jeopardy ruling was premised upon this Court's standard of appellate review whereby a reviewing court must sustain a conviction if the evidence, viewed in the light most favorable to the prosecution, would warrant a jury finding the defendant guilty beyond a reasonable doubt. *See Burks*, 437 U.S. at 17. The Minnesota Supreme Court violated this standard of evidentiary review when it reversed respondent's conviction on insufficiency grounds and imposed a much more stringent standard of proof upon the prosecution than is required by the due process clause. Basic concepts of fairness inherent in the due process clause were also violated when the Minnesota Supreme Court reversed the murder convictions without viewing *all* of the evidence supporting guilt.

In holding in *Burks v. United States* that the double jeopardy clause barred retrial after a reversal based on evidentiary insufficiency, this Court explained that this holding was required by the fact that federal reviewing courts may only reverse on this ground when the prosecution's case "was so lacking that it should not have even been *submitted* to the jury." *Id.* at 16 (emphasis in original). Such rulings would be "confined to cases where the prosecution's failure is

clear." *Id.* at 17. In *Jackson v. Virginia*, this Court set forth in detail the following constitutional standard for reviewing the evidentiary sufficiency of a criminal conviction:

. . . [T]his inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby v. INS*, 385 U.S., at 282 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana*, 406 U.S., at 362. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

*Jackson*, 443 U.S. at 318-19 (emphasis in original, footnotes omitted).

In *Greene v. Massey*, this Court held that the *Burks* double jeopardy rule was "fully applicable to state criminal proceedings." *Greene*, 437 U.S. at 24. In a concurring opinion, Mr. Chief Justice Rehnquist cautioned that the *Burks* rule may not be applicable to state insufficiency rulings that are based

upon a higher standard of proof than that required by the due process clause. Mr. Chief Justice Rehnquist explicitly stated:

. . . I would want to emphasize more than the Court does in its opinion the varying practices with respect to motions for new trial and other challenges to the sufficiency of the evidence both at the trial level and on appeal in the 50 different States in the Union. Thus, to the extent that . . . practice in this regard differs from practice in the federal system, the impact of the Double Jeopardy Clause may likewise differ with respect to a particular proceeding.

*Greene*, 437 U.S. at 27 (Rehnquist, J., concurring).

In *Tibbs v. Florida*, 457 U.S. 31 (1982), this Court held that even if a state court reversed a conviction on evidentiary grounds, the *Burks* double jeopardy rule does not bar retrial if the evidence was sufficient to satisfy the due process clause. Despite the fact that the evidence supporting the conviction in *Tibbs* "clearly satisfied the due process test of *Jackson v. Virginia*", *id.* at 45 n. 21, the Florida Supreme Court reversed the conviction because it had serious doubts as to the credibility of the prosecution's chief witness. *See id.* at 37-38. In affirming the Florida Supreme Court's order remanding the case for a new trial, Mm. Justice O'Connor stated that when an appellate court reverses a legally sufficient conviction on evidentiary grounds:

. . . [It] sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony . . . . [A]n appellate court's disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal.

*Id.* at 42. Mme. Justice O'Connor further stated:

Just as the Double Jeopardy Clause does not require society to pay the high price of freeing every defendant whose first trial was tainted by prosecutorial error, it should not exact the price of immunity for every defendant who persuades an appellate panel to overturn an error-free conviction and give him a second chance at acquittal.

*Id.* at 44.

In *Tibbs*, the Florida Supreme Court conceded that the evidence was technically sufficient and that its evidentiary reversal was based upon its re-weighing of the evidence. See *id.* at 38. In contrast, the Minnesota Supreme Court has refused to acknowledge that the evidence was technically sufficient under the due process test and its ruling that the evidence was insufficient will bar retrial *unless it is reversed*. The issue before this Court, therefore, is whether a state appellate court may label a legally sufficient conviction as insufficient, thereby invoking the federal constitution's double jeopardy bar against retrial. Allowing a state court to do so is clearly contrary to the policies set forth by this Court in both *Burks* and *Tibbs*.

The evidence in this case is plainly sufficient to sustain a conviction under the *Jackson* due process test. Viewing the evidence in the light most favorable to the prosecution shows that several gallons of gasoline were spread throughout the first floor of the townhouse, on the stairway and at the entrance to the two second-story bedrooms where the boys were trapped. The gasoline covered the living room and hallway area and any fire would have ignited this area instantaneously. Because the physical evidence showed that respondent could not have run through this area as he claimed without

suffering severe injury, the jury could have rationally concluded that respondent lied about being inside the townhouse when the fire started. Respondent's presence outside the townhouse at the time the fire began, along with his impossible claim of being inside when it occurred, was sufficient to sustain the jury's finding beyond a reasonable doubt that respondent was the arsonist. Even respondent admitted that it was unlikely that someone else could have broken in and poured gasoline throughout the house without waking him as he slept on the living room couch.

By ruling that the evidence was legally insufficient, the Minnesota Supreme Court departed from the *Jackson* due process test of sufficiency as well as from its own traditional evidentiary test. The Minnesota Supreme Court violated this test in three ways: (1) it imposed a more stringent standard of review than required by the due process clause; (2) it viewed the evidence in the light most favorable to the defense; and (3) it refused to view *all* of the evidence showing guilt and erroneously construed many of the facts supporting guilt.

That the Minnesota Supreme Court's reversal was based on a standard more stringent than that required by the due process test is evident by its use of the following circumstantial evidence standard to justify its reversal:

The circumstantial evidence in a criminal case is entitled to as much weight as any other kind of evidence so long as the circumstances proved are consistent with the hypothesis that the accused is guilty and inconsistent with any rational hypothesis except that of his guilt.

*State v. Berndt*, 392 N.W.2d 876, 880 (Minn. 1986) (App. A10). In *Jackson v. Virginia* this Court explicitly rejected the contention that the due process clause required this standard of review. See *Jackson*, 443 U.S. at 326. See also *Holland v.*

*United States*, 348 U.S. 121, 140-41 (1954). The evidence need not negate every reasonable theory consistent with the defendant's innocence to sustain a criminal conviction under the *Jackson* due process test. See *Holland*, 348 U.S. at 138-41.

The evidence would have even satisfied this more stringent standard had the Minnesota Supreme Court not also violated the due process test's requirement that *the evidence must be viewed in the light most favorable to the prosecution*. This "was a classic case of conflicting evidence in which the jury had to pass on the credibility of the witnesses." *Anderson v. Fuller*, 455 U.S. 1028, 1031 (1982) (Burger, C.J., dissenting) (denial of petition for certiorari). The testimony of the prosecution's arson experts established that the fire was an act of arson committed with gasoline and that respondent's claim of being inside the house at the time of ignition was physically impossible. Two defense experts disputed the gasoline findings and theorized that the fire could have been caused by a smoldering cigarette. The jury's verdicts of guilty show that it did not believe the defense's experts and obviously accepted as true the testimony of the prosecution's experts. "It is sheer nonsense to suggest that, on this record, the 12 jurors acted irrationally." *Id.* at 1033. See generally *Hoffa v. United States*, 385 U.S. 293, 311 (1966), *reh'g denied*, 456 U.S. 940 (1967) ("established safeguards of the Anglo-American legal system leave the veracity of a witness to be . . . determined by a properly instructed jury").

That the Minnesota Supreme Court rejected the jury's determinations of credibility is demonstrated by the fact that the only circumstances that it could refer to as being inconsistent with respondent's guilt was the defense's theory that the fire was accidental. The logical corollary of this ruling is

that the prosecution can never prove arson beyond a reasonable doubt whenever the defense produces an expert with a theory of accidental fire—no matter how preposterous the theory.

The Minnesota Supreme Court's claim that even if it were to view the evidence in the light most favorable to the verdict, there was no evidence to show that respondent was the arsonist *flagrantly* overlooks the physical evidence and arson expert testimony. This evidence established that respondent could not have possibly been in the townhouse at the time the fire ignited and that he lied about being in this house. This justifies the rational conclusion that respondent was the arsonist. What other rational hypothesis is possible when the evidence is viewed in the light most favorable to the prosecution? It is not rational to conclude that respondent stood outside watching while someone else spread the gasoline and ignited the fire and then lied to the police to protect the arsonist who had murdered his family.

In relying upon the fact that there was no odor of gasoline detected at either the fire scene or on respondent's person to justify its insufficiency ruling, the Minnesota Supreme Court substituted its judgment not only for that of the jurors but also for that of the trained arson investigators who testified. By setting aside the jury verdicts on the basis of their non-expert opinions concerning the odor of gasoline at a fire, the justices of the Minnesota Supreme Court "acted like jurors, not jurists." *Anderson*, 455 U.S. at 1033 (Burger, C.J., dissenting).

Finally, the Minnesota Supreme Court violated the due process test when it adamantly refused to view all the evidence showing respondent's guilt. Evidentiary exhibits essential to the jury's acceptance of the prosecution's expert witnesses'

opinions were never delivered to or examined by the Minnesota Supreme Court. When this grievous oversight was pointed out by the prosecution on rehearing, the Minnesota Supreme Court explicitly refused to examine both the undelivered exhibits *and* the prosecution's reproduction of Exhibits Nos. 18 and 19, two of these undelivered exhibits. Examination of these exhibits was crucial to the jury's understanding and acceptance of the experts' testimony that respondent could not have escaped from the townhouse without suffering severe injury. Examination of the location of the burn patterns caused by the gasoline in the living room and hallway in Exhibit No. 18 demonstrates the absurdity of the Minnesota Supreme Court's conclusion that respondent could have escaped from the townhouse without incurring severe injury (App. F). Not only did the Minnesota Supreme Court refuse to examine essential evidentiary exhibits, the opinion shows that its ruling was based upon facts not supported by the record. Many of the facts contained in the decision are simply wrong. The opinion also consistently omits essential evidence supporting respondent's guilt.

Just as the affirmance of a conviction's evidentiary sufficiency by an appellate court that has not adequately reviewed all the evidence violates the due process test, a reversal on insufficiency grounds where the appellate court has not reviewed all the evidence equally offends the concept of due process. As Mr. Justice Cardozo once stated:

But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

*Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 122 (1934). Society has a vital interest in bringing to justice criminals who murder defenseless women and children while they sleep. This interest and the public's safety is unduly frustrated when an appellate court not only chooses to reverse a legally sufficient conviction *but* also incorrectly labels the grounds for reversal as that of "evidentiary insufficiency," thereby invoking the federal constitution's double jeopardy clause's bar against retrial.

It is clear that the propriety of a state court in ruling on the sufficiency of evidence in a criminal case is a proper matter for federal appellate review.<sup>15</sup> In *Jackson v. Virginia* this Court reviewed and affirmed a state court's finding of sufficiency when a federal court misapplied the due process test of evidentiary sufficiency. *See Jackson, supra*. In *Tibbs v. Florida*, this Court independently examined the underlying trial record to determine whether the state appellate court's

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<sup>15</sup> Prosecution appeals of insufficiency rulings reversing a guilty verdict are not prohibited by the double jeopardy clause "[s]ince reversal on appeal would merely reinstate the jury's verdict." *United States v. Wilson*, 420 U.S. 332, 344-45 (1975) (government appeal of post-verdict dismissal of indictment). In *United States v. DiFrancesco*, 449 U.S. 117 (1980), this Court noted in dictum that "the Double Jeopardy Clause does not bar a Government appeal from a ruling in favor of a defendant after a guilty verdict has been entered by the trier of fact." *Id.* at 130. That appeals of insufficiency rulings are also permissible was implied when the Court supported this dictum by citing two federal circuit court of appeals cases that held that the government can appeal post-verdict acquittals. *See United States v. Rojas*, 554 F.2d 938, 942 (9th Cir. 1977); *United States v. DeGarces*, 518 F.2d 1156, 1159 (2d Cir. 1975). Several other federal circuit courts of appeals have also explicitly held that the double jeopardy clause does not bar government appeals of post-verdict acquittals. *See e.g., United States v. Steed*, 674 F.2d 284, 285-86 (4th Cir.), *cert. denied*, 456 U.S. 909 (1982).

reversal was properly based on its re-weighing of the evidence rather than on legal insufficiency. See *Tibbs*, *supra*. Federal courts routinely examine state convictions to determine if state courts properly ruled that the evidence was legally sufficient. See e.g., *Scott v. Perini*, 662 F.2d 428 (6th Cir. 1981), *cert. denied*, 456 U.S. 909 (1982). The decision in this case should not escape constitutional review simply because the Minnesota Supreme Court, unlike the state appellate court in *Tibbs*, persisted in incorrectly labelling as insufficient a legally sufficient conviction.

The decision warrants consideration by this Court because the Minnesota Supreme Court has applied the standard of "evidentiary insufficiency" in a way that threatens to lead to reversals of state court criminal convictions and to the bestowing of the immunity afforded by the double jeopardy clause whenever a state court chooses to sit as a jury and set aside the lawful findings of fact. Unless a writ of certiorari is granted, Mr. Chief Justice Rehnquist's qualification in *Greene v. Massey* that the double jeopardy clause should only be applied to state insufficiency findings that are consistent with the federal standard for insufficiency will only be an empty admonishment and a defendant who was legally convicted of *four* heinous murders will be irrevocably set free.

## CONCLUSION

For the foregoing reasons, the State of Minnesota respectfully prays that the petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court be granted.

Respectfully submitted,

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